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In The

Supreme Court of the United States

October Term, 1992

EDWARD L. TULL AND LOUISE A. TULL,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA

and

BOARD OF SUPERVISORS
OF ACCOMACK COUNTY, VIRGINIA,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF OF BOARD OF SUPERVISORS OF ACCOMACK COUNTY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a writ of certiorari should be granted to consider the possibility of requiring a county which has properly regulated wetlands use to pay damages to petitioners who were denied a permit to fill wetlands constituting a small fraction of a valuable parcel of land acquired by petitioners long after the pertinent regulations were in place, which were subdivided and isolated from the balance of the parcel by petitioners in such a way as to minimize their value, and which were of only nominal value when acquired by petitioners?

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STATEMENT OF THE CASE

The facts of this case are straightforward and largely undisputed though some important facts were avoided by Petitioners in their Statement of the Case. In 1972, the General Assembly of the Commonwealth of Virginia enacted Chapter 2.1 of Title 62.1 of the Code of Virginia, known as the Wetlands Act, requiring, among other things, permits to be obtained for the filling of wetlands.

The regulatory scheme established by the Act provides for direct regulation by the Virginia Marine Resources Commission (VMRC) (Code of Virginia §62.1-13.9) unless the particular locality in question has adopted, *verbatim*, the model ordinance regulating wetlands set out at Code of Virginia §62.1-13.5. In 1972, the Accomack Board of Supervisors adopted the Wetlands Ordinance set out in Code of Virginia §62.1-13.5 and established the Accomack County Wetlands Board.[1]

In 1980, fully eight years after the Wetlands Act and Ordinance were adopted, Petitioners (hereinafter, "Tulls" or "Petitioners"), acquired an undivided one-third interest in 43 acres which included that now in dispute and in 1983 the Tulls acquired the remaining two-thirds interest. Trans. at 115, 116, 117, 190. The Tulls sought to subdivide 12 acres of the 43 acres into something designated "Ocean Breeze Mobile Home Sites, Section D" as shown on a certain plat received into evidence as Exhibit 5 A, (Trans. at 64). In 1985, the proposed subdivision was approved as a ministerial act and, quite properly, without inquiry about whether or not

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[1] If a locality does adopt such an ordinance, permit applications are to be filed with and acted on by the local Wetlands Board. However, every action of a local Wetlands Board is reviewed by the Commissioner of the VMRC pursuant to Code of Virginia §62.1-13.10 and the VMRC itself has absolute authority to modify or reverse any decision of the local Wetlands Board that does not achieve or comply with the VMRC's policies, standards, or guidelines. Code of Virginia §62.1-13.13. This regulatory scheme led Accomack County to argue to the Trial Court that any liability for the enforcement of the Wetlands Act should be the Commonwealth's alone. The disposition of the case made it unnecessary for either the Trial Court or the Virginia Supreme Court to decide this question.

wetlands were involved.[2] Trans. at 80. To this point no permit to fill had been sought, but the Tulls, who had been in litigation regarding wetlands on other tracts since the 1970s, (Trans. at 203), deemed it appropriate to include a notation on the Ocean Breeze plat stating at note 7 that:

> Portions of some lots may contain land defined as wetlands by State and Federal agencies. The lot purchaser of said lot purchases same as is and saves harmless the Developer from all responsibility from any damages that might result from that land being filled or otherwise altered by the lot owner.
>
> Plat, Exhibit 5 A.

A portion of the Ocean Breeze, Section D, subdivision was, in fact, wetlands subject to the Wetlands Act. In 1987, the Tulls sought a permit from the local Wetlands Board to fill those wetlands, amounting to about two acres, purporting to be separated from the uplands by the Tulls' subdivision scheme, which permit was denied. Trial Stipulation of Facts and Exhibits #6. The denial was appealed by the Tulls to the VMRC where the Tulls argued that failure to grant the permit would amount to an unconstitutional taking, the constitutional argument

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[2] There is no provision in Accomack County's subdivision ordinance or state law which requires that property be identified as wetlands or otherwise prior to subdivision. Subdivision is a purely ministerial act by the County agent.

being specifically rejected by the VMRC. Trial Stipulation of Facts and Exhibits #7.[3]

Edward Tull presented rather convoluted evidence as to his expenditures and receipts on the 43-acre original parcel, the 12- acre parcel designated Ocean Breeze, Section D, and the two acres for which the permit was sought. It is worth noting that the Tulls' evidence on expenses included tens of thousands of dollars in attorneys' fees relating to the instant litigation (Trans. at 137), tens of thousands of dollars in attorneys' fees relating to earlier unrelated wetlands litigation in the federal courts (Trans. at 138), $25,000 paid by the Tulls to the United States as civil damages which was a rebate of money earlier paid *to* the Tulls by the United States in an unrelated case (Trans. at 135, 136), and $102,210 for roadwork done well *after* the permit had been denied (Trans. at 208). The Trial Court found as a fact that, without the litigation costs, the Tulls would under their own evidence

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[3] The VMRC is mandated to modify, reverse or remand decisions of local wetlands boards which are in "violation of constitutional provisions". Code of Virginia §62.1-13.13(2)(a). The Tulls did not appeal the VMRC's Action to the Accomack County Circuit Court, which they could have done pursuant to Code of Virginia §62.1-13.15, and where they could have argued that the permit must be granted since to deny it would amount to an unconstitutional taking of the two acres. Instead, the Tulls sought compensation for the alleged taking, resulting in the litigation at bar. Accomack County argued at trial that the constitutional finding of no taking by the VMRC became the law of the case when it was not appealed by Petitioners. This argument was rejected by the Trial Court and raised in the Virginia Supreme Court (by assignment of cross error). That Court was not required to decide it since it affirmed the Trial Court's decision in favor of Accomack County on other grounds.

have made a sizeable profit on the Ocean Breeze project (Trans. at 343, 344), even without reference to the many other lots sold elsewhere in the 43 acres for more than $400,000 and to the many lots yet to be sold by them (Trans. at 196 and 218).

The Tulls presented evidence from a qualified appraiser on the value of the two acres with and without the permit to fill. (Trans. 33-63). Unfortunately for Petitioners' case, the appraiser testified on cross-examination that wetlands which are a portion of a developable lot may have more value than those which are segregated or isolated by the subdivider's choice (Trans. at 40-45); that a rational buyer discounts the price he or she is willing to pay for wetlands because of the uncertainty of obtaining a permit to fill, (Trans. at 46-47), and even that the property in question had virtually no value *when Petitioners acquired* it. (Trans. at 50, 51).

Neither the Commonwealth nor the County presented evidence, arguing that the Tulls had shown no damages (Trans. at 301) and that, if there had been diminution in value due to the permit denial, it was not so substantial as to amount to a compensable taking. The Trial Court found that the petitioners were not entitled to damages because there had been no taking in as much as the Tulls had not lost all "viable economic use" of the property. Petitioners' Appendix at 4a and 5a.[4]

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[4] In reaching its conclusion, the Trial Court decided that the "parcel as a whole" for its takings analysis was neither the lots urged by the Tulls (amounting to about two acres) nor the 43 acres originally acquired by Petitioners (as argued by Respondents) but rather, the approximately twelve acres consisting of

It is surely by design that Petitioners in their Statement of the Case neglected to draw the Court's attention to the facts that they acquired their property long after the Wetlands regulations were in place, that their own expert testified that the wetlands were of only nominal value when acquired, and that the Petitioners subdivided the property in such a way as to segregate and minimize the value of the wetlands here in question. Petitioners' arguments rely in part upon tax assessments and expenditures based upon Petitioners' own subdivision of their property without regard to whether or not a permit to fill the wetlands could be obtained. Petition at 4-6. It would be bizarre if a public entity such as Accomack County were required by this Court to reward Petitioners for what were regulated and virtually valueless wetlands when acquired by Petitioners and which were managed by Petitioners in such a way as to minimize what little value the property had.

REASONS FOR DENYING THE WRIT

Petitioners, wishing to fill a particular two acre tract of wetlands and having already exploited the uplands adjacent to that tract of wetlands, require a rule from this Court which would essentially mandate compensation

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the subdivision of which the wetlands here in question are a part. Because that twelve acre parcel, even without a permit to fill the two acres of wetlands in question, was demonstrably economically valuable and, in fact, had generated a substantial profit for the Tulls, the Court found that there had been no taking. Petitioners' Appendix 4a and 5a.

whenever a permit to fill wetlands is denied. To rationalize this result, Petitioners urge this Court to announce that, in takings analyses, the economic impact of the regulatory action be measured only against the ownership interest which is directly regulated, here the wetlands, rather than against some more encompassing entity, here the larger tract including profitable uplands.

To satisfy the criteria of Rule 10 of the United States Supreme Court Rules, Petitioners argue that "confusion" abounds regarding the meaning and application of the "parcel as a whole" doctrine made prominent in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), (*"Penn Central"*). In support of this allegation, Petitioners cite cases from this Supreme Court and elsewhere purporting to show that there is controversy about the parcel as a whole concept to the extent that some courts faced with the facts in the case at bar would deem the wetlands to be the parcel as a whole for consideration, in contrast to the decision of the Supreme Court of Virginia.

In actual fact, though there is clearly debate on the appropriate unit against which to measure diminishment of value in regulatory takings cases as exemplified by Chief Justice Rehnquist's dissents in *Penn Central* and in *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (1987) (*"Keystone Coal"*), there really is no serious controversy about the parcel as a whole concept insofar as it would apply to the case at bar. Because this brief is merely a response in opposition to the granting of a writ of certiorari and because the reason advanced for the granting of the writ is the supposed "confusion" on the parcel as a whole issue raised by Petitioners, this

response will focus on rebutting that allegation of confusion. To that end, Respondent Accomack County proposes simply to examine the cases cited by Petitioners in support of its argument. Such an examination proves unambiguously that there is no reason to believe that any federal court of appeals or state court of last resort would have decided this case any differently than did the Supreme Court of Virginia.

1. United States Supreme Court

Petitioners in this case have seized upon this Court's recent decision, *Lucas v. South Carolina Coastal Council*, ___ U.S. ___ (1992) No. 91-453, slip op. (June 29, 1992) ("*Lucas*"), and in particular, footnote 7 in Justice Scalia's opinion wherein he remarks that

> this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.
>
> *Lucas*, slip op., at 11, n. 7.

as reason to hope that the Court is somehow ready to discard the *Penn Central* concept of parcel as a whole and, instead, adopt a more limited view of the "denominator" imagined by Petitioners to have been established in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ("*Mahon*"). It does not appear to Respondent Accomack County that *Lucas* gives Petitioners any help. First, *Lucas* simply did not present a situation in which the parcel as a whole was in any way controverted. There was no suggestion that there was any interest in land that could be considered more expansive than the fee simple interest in the lots

pleaded by Lucas and, though deemed to be a questionable finding by four justices (Justice Kennedy, concurring, *Lucas*, slip op. at 2, Justice Blackmun, dissenting, *Lucas*, slip op. at 9, 10, Justice Stevens, dissenting, *Lucas*, slip op. at 5, n. 3, and Justice Souter, statement at 1.), Lucas came to the Court with a finding that all economically viable use of the property in question had been extinguished. *Lucas*, slip op. at 6. Nothing in any opinion in *Lucas* is inconsistent with the parcel as a whole concept articulated in *Penn Central* nor with that relied upon by the trial court in the case at bar. Secondly, the majority opinion in *Lucas* clearly contemplates that takings analyses should be made in light of the property owner's reasonable economic expectations at the time he acquires the property:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire *when they obtain title to property*.
>
> *Lucas*, slip op. at 21, 22 (emphasis added, footnote omitted)

In the case at bar, Petitioners bought the 43 acre parcel containing the two acres of wetlands now sought to be filled several years after the restrictive regulations were

in place. Petitioners knew that a permit would be required to fill the two acres but subdivided and spent money on their property as though the permit had already been issued. Petitioners' own expert testified that the wetlands were of only nominal value before the regulations, after the regulations, and when they were acquired by Petitioners. Clearly, Petitioners' reasonable investment backed expectations were very different from those of the petitioner in *Lucas* who spent $975,000.00 on property that, *when he acquired it*, could be lawfully improved with two dwelling houses. *Lucas*, slip op. at 1. To the extent that *Lucas* breaks new ground – and it does not even purport to do so on the parcel as a whole issue sought to be reviewed by Petitioners – its holdings do not help Petitioners' cause.

Petitioners seem to argue that takings jurisprudence somehow made predictable and sensible by *Mahon*, became confused by this Court's holding in *Penn Central*. Petition at 12.[5] Actually, *Penn Central* merely made

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[5] Though certainly framed in terms of diminution of value, Justice Holmes' opinion seems largely to be animated by a view that the statute in question was an impermissible impairment of contract and did not bear a sufficient relation to public health, safety or welfare, i.e., "does not substantially advance legitimate state interests" *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In what might be characterized as his preliminary remarks, for example, he says that "[t]he extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety." *Mahon*, 260 U.S. at 413, 414. His analysis of the statute is similar to that of the Montana Supreme Court in *Western Energy Company v. Genie Land Company*, 737 P.2d 478 (1987), discussed below.

express what had perhaps previously been implicit: that in evaluating the impact of a government regulation alleged to have resulted in a taking, the diminishment in value must be measured against the "parcel as a whole" – all of the land or the ownership rights reasonably related to that alleged to have been taken. Any other approach would require payment whenever a government regulation diminished the value of property and, in the words of Justice Holmes, "[g]overnment hardly could go on". *Mahon*, 260 U.S. at 413. Nevertheless, two of this Court's cases, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) ("*Kaiser Aetna*"), and *Keystone Coal*, supra, are identified by Petitioners as examples in which the parcel as a whole considered by the Court was supposedly limited to only that directly regulated (according to Petitioners, a pond and marina in *Kaiser Aetna* and coal in *Keystone Coal*. Petition at 18 and 19). Petitioners' theory, of course, is that, by analogy, the Court should in the case at bar consider only the two acres of wetlands for which a permit to fill was denied in its takings analysis rather than the many and highly profitable acres of uplands which constituted the bulk of the parcel of which the two acres of wetlands were a part. *Kaiser Aetna*, though, is in no way parallel or similar to the case at bar. As Justice Scalia points out in *Lucas*, *Kaiser Aetna* is an instance in which the property owner was required "to suffer a physical 'invasion' of his property" (a navigational servitude). *Lucas* slip op. at 10. Such physical invasions consistently have been held to amount to takings with little further inquiry even where as, for example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the invasion was at most 1-1/2 cubic feet of the owner's

property. There is no such situation suggested in the case at bar. And in *Keystone Coal*, though the "relevant calculus" applied by the Court included only coal, since the complainants apparently owned nothing but mineral rights, it is clear that the "parcel as a whole" identified by the Court was as expansive as it could reasonably have been:

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.
>
> *Keystone Coal*, 480 U.S. at 499.

It is easy and correct to analogize the two acres of wetlands in the case at bar to the coal pillars required to be left in the ground in *Keystone Coal*, and the balance of Petitioners' parcel which is developable (and which has, in fact, generated profit), to the "context of any reasonable unit of petitioner's coal mining operations and financially backed expectations." *Kaiser Aetna*, 480 U.S. at 499.

2. United States Courts of Appeals

Petitioners assert that "[t]he Supreme Court of Virginia has decided this important federal question in conflict with . . . some of the decisions of the United States Court's [sic] of Appeal [sic]". Petition at 8. If that is true, it is not made evident by the cases cited in the Petition. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844

F.2d 172 (4th Cir. 1988), is cited for the proposition that the "Fourth Circuit Court of Appeals does not agree with the Supreme Court of Virginia's view that non-regulated property is part of the 'relevant calculus' ". Petition at 19. This is a singularly inapposite citation since, in that case involving prohibition of commercial speech on billboards, the Fourth Circuit expressly states that the relevant calculus for evaluating the loss to the petitioners therein should include not only the billboards affected by the regulation but *all* petitioner's billboards in a geographical area exceeding even the jurisdiction of the regulating body of government, the City of Durham:

> Clearly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone*, do not constitute a separate segment of property for taking purposes. . . . If Naegele advertises cigarettes or any other product through sharing contracts that are nationwide or in other broadly defined markets, the unit of its affected property may be larger than in the business it conducts in the triangle area.
>
> *Naegele Outdoor Advertising*, 844 F.2d at 176[6] (citation omitted)

If *Naegele Outdoor Advertising* is any indication, the United States Court of Appeals for the Fourth Circuit would certainly agree with the Virginia Supreme Court in this case.

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[6] It is interesting to realize that in fact patterns like those in *Naegele Outdoor Advertising* where the regulation diminishes economic value of property not itself directly regulated, a more expansive parcel as a whole analysis could conceivably help the property owner rather than hurt him for takings purposes.

The only other Federal Circuit to which Petitioners refer (except for the Claims Court cases discussed below) is the Ninth. Here again, the citations chosen are so unpersuasive as to suggest that there must actually be serene uniformity in the federal circuits on the question raised by Petitioners. The earlier of the cases, *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), is essentially conceded by Petitioners to be inconsistent with this Court's holding in *Keystone Coal*. Petition at 20, citing *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1204 (N.D. Calif. 1988). Comparing it even academically to the case at bar, however, it is clearly distinguishable from and consistent with the holding of the Virginia Supreme Court here. In *American Savings*, the property owner, like that in *Lucas*, acquired his property under one set of regulations and subsequently had imposed upon him a far more restrictive regulatory scheme. In the case at bar, on the other hand, the regulations complained of had been in place for many years prior to Petitioners' acquisition of the affected property, obviously creating a very different and, for Petitioners, lower level of financially backed expectation. And, in any event, in the *American Savings* case, the court remanded for consideration of the question of whether two adjacent parcels, zoned differently, but under common ownership, should be deemed the parcel as a whole. The court was clearly influenced by the possibility that the parcel which was alleged to have been the subject of the taking may have been subjected to what is sometimes known as "spot" or non-uniform zoning, which would distinguish the case from *Penn Central* and other cases (as well as that at bar) where the parcels in question were affected by a

regulatory scheme of wide or uniform application. *American Savings*, 653 F.2d at 371.

The later Ninth Circuit case cited, *MacCleod v. Santa Clara County*, 749 F.2d 541 (9th Cir. 1984), decided after *Keystone Coal*, is totally consistent with the ruling in the case at bar, holding that it was proper to consider the value of an entire 7000 acre parcel in determining whether a denial of a permit to harvest timber from a part of it constituted a taking.

3. State Courts of Last Resort

. Petitioners cite cases from state courts in New Hampshire, Washington, Montana, California, New York, Delaware, New Jersey, South Carolina, Massachusetts, Michigan, and Pennsylvania purporting to show that "[c]onfusion, and inconsistent application of the 'parcel as a whole' doctrine to include or not include non-regulated property in the 'relevant calculus' since *Penn Central*, has also resulted in the state courts." Petition at 21. Contrary to what is contemplated by Rule 10 of the United States Supreme Court Rules, Petitioners cite a number of cases from courts which are not the courts of last resort in those states. Thus, we do not know how the respective courts of last resort would have ruled in *Aptos Seascape Corporation v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal. Rptr. 191 (Cal. Ct. of App., 1st Dist. 1983); *St. Aubin v. Flacke*, 492 N.Y.S.2d 766, 109 A.D.2d 481 (Sup. Ct., App. Div. 1985); *Lewis v. New Castle County Board of Adjustment*, 601 A.2d 1048 (Sup. Ct. of Del. 1989); *American Dredging Company v. State Dept. of Environmental Protection*, 169 N.J. Super 18, 404 A.2d 42 (N.J. Sup. Ct., App.

Div. 1979), *Chase Manhattan Bank, N.A., v. State of New York*, 103 A.D. 2d 211, 479 N.Y.S.2d 983 (NY Sup. Ct., App.Div. 1984), *Gannett v. Lowell*, 450N.E.2d 1121 (App. Ct. of Mass 1983) (which in any event appears to be mistakenly cited since it is not a taking case), and *Jones v. Zoning Hearing Board*, 578 A.2d 1369 (Com. Ct. Pa. 1990), all cited by Petitioners, and those cases are, therefore, of little or no use in deciding whether a writ of certiorari is appropriate in the case at bar. It is worth noting that many of those cases are conceded by Petitioners to be consistent with the decision objected to in this case and, with one partial exception (a couple of the plaintiffs in *St. Aubin v. Flacke, supra*), all of the cases apparently involve property the use of which was restricted *after* acquisition by their owners. Accordingly, the financially backed expectations and, in the language of Justice Scalia, the "understandings of our citizens [in this case the Petitioners] regarding the content of, and the State's power over, the 'bundle of rights' that they acquire *when they obtain title to the property*", *Lucas*, slip op. at 21, 22, (emphasis added), were very different in the case at bar where Petitioners acquired their property long after a portion of their 43 acres had been made subject to regulation as wetlands. Those cases, not from state courts of last resort, will not be further addressed in this Brief in Opposition. None of the cases cited by Petitioners which *are* from courts of last resort suggest any conflict or confusion in the understanding or application by those courts of the parcel as a whole rule articulated by this Court in *Penn Central*.

Two cases from the Supreme Court of Washington are cited by Petitioners and nicely illustrate the deficiencies

of their presentation to the Court. *Allingham v. City of Seattle*, 749 P.2d 160 (1988), is a case which, in addition to being easily distinguishable from that at bar (the plaintiffs there apparently owned their property prior to the imposition of the ordinance complained of), was explicitly reversed by the Washington Supreme Court in *Presbytery of Seattle v. King County*, 787 P.2d 907 (1990), also cited by Petitioners. Petitioners state that *Allingham* was overruled because of this Court's rulings in *Penn Central* and *Keystone Coal*. Petition at 21. In fact, both *Penn Central* and *Keystone Coal* had been decided *prior* to the *Allingham* decision and in the later case, the Washington Supreme Court saw fit to remark that

> With the exception of this court's recent decision in *Allingham v. Seattle*, . . . neither state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a piece of it has been taken or whether a due process violation had occurred with regard to a piece of regulated property. Rather, we have consistently viewed a parcel of regulated property in its entirety.
>
> *Presbytery of Seattle*, 787 P.2d at 914, 915.

In the *Presbytery of Seattle* case, the Washington Supreme Court approved denial of a permit to develop wetlands constituting only a part of a tract, other portions of which had value. Clearly, the *Allingham* case was an aberration, expressly overruled by the Washington Supreme Court, *Presbytery of Seattle*, 787 P.2d at 915, which unambiguously applies the parcel as a whole concept as it was

correctly applied in the case at bar by the Supreme Court of Virginia.

Petitioners likewise cite two cases decided by the Supreme Court of New Hampshire, neither of which is inconsistent with the ruling in this case. *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981), dramatically demonstrates that the concept of regulatory taking developed by this Court is necessary, even where there is no physical invasion by the state. In that case, a property owner refused a below market value offer for his land from the city which coveted it for "open space". When the owner refused, the city rezoned 109 of the land owner's 124 acres as a "conservation zone". The Supreme Court of New Hampshire had no difficulty finding that a taking had occurred and awarded even attorneys' fees, finding it appropriate to remark that

> Planners and other officials should be aware of possible personal liability for bad faith violations of a landowner's constitutional rights which may go beyond the damages recoverable for inverse condemnation.
>
> *Burrows v. City of Keene*, 432 A.2d at 20.

It is truly difficult to understand how Petitioners think this case supports their position or is inconsistent in any way with the ruling in the case at bar. *Claridge v. New Hampshire Wetlands Board*, 485 A. 2d 287 (N.H. 1984), also cited by Petitioners, where the court approved denial of a permit to fill even where the denial essentially rendered the parcel unbuildable, though entirely consistent with the case at bar insofar as it affirms a permit denial, really

sheds no light one way or another on the question presented to the Court issue since what the parcel as a whole was does not seem to have been in controversy. On the other hand, the property owner in that case, like the Petitioners here, had bought his property after it had become subject to wetlands regulation and, to some degree, the New Hampshire Supreme Court anticipated Justice Scalia's thoughts in *Lucas*, slip op. at 21, 22, when it observed that

> A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights.
>
> *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d at 291.

There can be no doubt that the New Hampshire Supreme Court would have affirmed the decision of the trial court in this case.

That Petitioners should cite *Western Energy Company v. Genie Land Company*, 737 P.2d 478, 227 Mont. 74 (1987), in support of their case is the next thing to an insult to the intelligence. A fair reading of that case reveals that the decision is grounded not on an analysis of diminution of economic value, though that is discussed, but, rather, on the fact that the "statute does not bear the requisite 'substantial relation to the public health, safety, morals, or general welfare.'". *Id.* at 481, quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). It is hard to see how the court could have ruled otherwise since

> The statute merely provides that when the owner of the minerals does not own the surface he cannot apply for a permit to mine without first receiving permission of the surface owner to enter and commence strip-mining operations on the land [even if the surface owner or his predecessor in interest had already contractually or otherwise conveyed the mineral rights, including the right to strip mine].
>
> *Id.* at 481.

Since the impediment to strip mining was the absence of permission of a private party and the statute did not even apply where mineral rights and surface rights were owned by the same party, the statute was appropriately viewed as an improper impairment of contract, outside the legitimate bounds of the police power, and declared unconstitutional. There is absolutely nothing in the opinion suggesting that the Montana Supreme Court would have decided the case at bar differently than did the Supreme Court of Virginia.

Neither case cited by Petitioners from the New York Court of Appeals is, to the limited extent comparable to the case under consideration, inconsistent with the ruling below. *Spears v. Berle*, 397 N.E.2d 1304, 48 N.Y.2d 254 (1979), was, as noted by Petitioners, remanded for evidence on the taking issue where the wetlands in controversy were only a portion of the larger parcel. Though it appears that the entire tract was to be considered the parcel as a whole, that issue was not explicitly addressed by the court. The second New York decision cited by Petitioners to which, amazingly, there were two dissents, is *Seawall Associates v. City of New York*, 542 N.E.2d 1059

(N.Y. 1989). There, the Court declared unconstitutional a statute that attempted to prohibit the

> demolition, alteration, or conversion of single-room occupancy (SRO) properties and obligates the owners to restore all units to habitable condition and lease them at controlled rents for an indefinite period.
>
> *Id.* at 1060, 1061.

The court found not only a regulatory taking but also a physical taking, 543 N.E.2d at 1062. Not surprisingly, though the case is extremely interesting, there was no discussion on the parcel as a whole issue, nor does the case indicate confusion or divergence of opinion from that of Virginia in connection with that issue.

One other state court of last resort, the Supreme Judicial Court of Massachusetts, is called upon twice in the Petition. Petitioners have somewhat distorted the holding in the first of those cases in order to seek the writ of certiorari. Of *MacGibbon v. Bd. of Apps. of Duxbury*, 255 N.E. 2d 347 (Mass 1970), (decided well before *Penn Central* or *Keystone Coal*), Petitioners say that it

> held that 'The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose' was not authorized.
>
> Petition at 25 quoting 255 N.E.2d at 351.

The implication in the Petition is, of course, that the court was making a constitutional ruling pertinent to the case

at bar. In fact, the full quotation, of which Petitioners offered only a portion reads as follows:

> The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power of authority delegated to municipalities under the Zoning Enabling Act.
>
> *MacGibbon v. Bd. of Apps. of Duxbury*, 255 N.E. 2d at 351.

The court, in other words, was construing a particular Massachusetts statute, not on constitutional grounds, later in the opinion expressly declining to rule on the question of whether a taking had occurred, and did not have any occasion to address the parcel as a whole question. *Id.* at 352. Though it still was not required to explicitly address the parcel as a whole question, the same court had no trouble finding no taking 11 years later in the second Massachusetts case cited by Petitioners where a denial of a permit to fill wetlands made about 55% of a parcel unbuildable. *Moskow v. Comm'r of Dept. of Env. Mgt.*, 427 N.E.2d 750 (Mass 1981). There was no suggestion that the wetlands should have been separated from the uplands for the takings analysis. It is abundantly clear that the Supreme Judicial Court of Massachusetts would rule in this case as did the Virginia Supreme Court.

Petitioners rely upon single cases from three additional states to show what they consider confusion on the parcel as a whole issue. In short, in none of them was a

taking found and none of them suggests a conflict among state courts of last resort on the question presented by Petitioners. Briefly, *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327 (S.C.1984), approved the denial of a permit to fill wetlands but produced no discussion about what the parcel as a whole was in that case. In *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344 (N.D. 1987), the Supreme Court of North Dakota found no taking after enactment of a statute prohibiting installation of utility lines within 75 feet of the center line of highways, especially where the complainant was seeking compensation for expenses incurred moving lines installed after the statute was in place. And in *Bevan v. Brandon Township*, 475 N.W.2d 37 (Mich 1991), the Michigan Supreme Court decided that two contiguous lots should be considered the parcel as a whole for the takings analysis. In that case, no taking was found and no wetlands were involved. However, the court addressed the subdivision aspect of the case in a way that is useful to the issue at bar and its remarks are worthy of extended quotation:

> [D]ivision of the property, "is not a fact or circumstance which affects or detracts from the reasonableness of the classification. If it were held to be so, the result would be that it would be competent for landowners to perpetually defeat zoning restrictions by crisscrossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others. The test of reasonableness may not be distorted or thwarted by any such artificial device." . . . "Artificial device[s]," such as tax identification numbers and separate

> deeds . . . are not controlling in determining whether enforcement of the ordinance in this case would amount to a taking.
>
> *Id.* at 43. (footnotes and citations omitted)

The correctness of this reasoning and its relevance to the case at bar are obvious. Acquiring 43 acres, some of which including the two acres here in dispute were subject to wetlands regulation, Petitioners voluntarily subdivided it in such a way as to isolate and minimize the value of the wetlands. Surely it would be unjust to now require Accomack County to reward Petitioners for the alleged consequences of their own actions.

Petitioners have cited not a single currently valid case decided by any state court of last resort that even implies that any state would decide the case at bar differently than did Virginia's Supreme Court.

4. United States Court of Claims

Finally, Petitioners advance the United States Court of Claims as manifesting more confusion about "parcel as a whole" and "relevant calculus["][sic] than any other body. Petition at 26. Since there is apparently very little confusion elsewhere, Petitioners' assertion may well be true and yet not mean much. Nevertheless, the Court of Claims cases cited do not support the Petitioners' argument that certiorari should be granted to resolve conflicts between federal courts of appeals. First of all, three of the opinions cited were not appellate decisions at all, namely *Florida Rock Industries, Inc. v. United States*, 8 Cl.Ct.160 (1988); *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381

(1988); and *Ciampetti v. United States*, 22 Cl.Ct. 310 (1991). Of those cases, the latest, *Ciampetti*, is clearly on all fours with the trial court's holding in the case at bar. *Loveladies Harbor* is now on appeal and, in any event, involved land which was subjected to stricter regulation after acquisition by its owner. The *Florida Rock* case, where Chief Judge Kozinski had found a taking to have occurred, was reversed by the United States Court of Appeals, Federal Circuit. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986). Petitioners attempt to retain some comfort from the case, however, by noting that the Appeals Court considered the appropriate unit for damages calculation to be only 98 acres for which a dredging permit had been sought as opposed to the entire 1560 acre tract owned by the complainant. Petition at 27. Truly, though, that comfort must be cold comfort indeed since the Court of Appeals was merely affirming the lower court's denial of a cross claim seeking damages for property which had not even been the subject of a permit request. *Id.* at 895. And again, it is significant that, unlike the case at bar, the regulations upon which the permit denial was based were enacted after the acquisition of the property in question. *Id.* at 895. Though *Florida Rock* is very different from the case at bar, there is no suggestion in *Florida Rock* that the Federal Circuit would have reached a different result in this case.

The remaining Court of Claims cases for which there have been appellate court consideration are entirely consistent with the decision of the trial court in this case and with that of the Virginia Supreme Court. The first, *Deltona Corporation v. United States*, 657 F.2d 1184 (1981), cert. denied, 455 U.S. 1017 (1982) (*"Deltona"*), approved denial of a permit

to dredge and fill wetlands based on a rather garden variety parcel as a whole analysis. Noting the many acres of the complainant's parcel that were developable even without the permit, the court deemed the case to "merely present an instance of some diminution in value." 657 F.2d at 1192, 1193. A very similar result was reached based on reasoning identical to that employed by the trial court in the case at bar in *Jentgen v. United States*, 657 F. 2d 1210, cert. denied, 455 U.S. 1017 (1982) ("*Jentgen*"), where the court found that the value of the developable portion of the claimant's property was sufficient to preclude a finding that its "property has been rendered valueless as the consequence of government regulation." *Id.* at 1213.

Grasping at a very thin straw, Petitioners attempt to distinguish *Deltona* and *Jentgen* from their case by alleging that

> The denial of just compensation in *Deltona* and *Jentgen* was predicated upon the fact that **both regulated wetlands and non-regulated uplands were combined in the permit applications** which were denied.
>
> Petition at 27 (emphasis in the original)

To be blunt, that assertion simply is not true or was clearly not a factor in the court's decision in either case. In *Deltona*, the court's analysis includes the observation that

> even within Barfield Bay and Big Key, there are located 111 acres of uplands which can be developed without obtaining a Corps permit and whose total market value is approximately $2.5 million.
>
> *Deltona v. United States*, 657 F.2d at 1192.

And in *Jentgen*, the court explicitly said of the applications that were denied that they

> related to approximately 80 acres of the Jentgen tract; the remaining 20 acres are uplands and can be developed without dredging and filling and, consequently, without the need for Corps authorization.
>
> *Jentgen v. United States*, 657 F.2d at 1212.

The fact of the matter is that no United States Court of Claims case which has survived appellate scrutiny is in any way inconsistent with the decision in the case at bar nor does any indicate "confusion" about the meaning or application of the terms "parcel as a whole" or "relevant calculus".

CONCLUSION

Petitioners expressly urge review of this case to resolve conflicts between the Virginia Supreme Court's decision in this case and those of the courts of last resort of other states as well as decisions of United States Courts of Appeals. In support of their petition, they have cited a hodge-podge of cases, including several from courts not of last resort, and have in some instances distorted the holdings in those cases. They have selectively stated the facts of this case, choosing to avoid facts which, if not critical to the decision, are certainly of interest to the Court, such as the facts that they purchased the property in question long after the regulations were in place and that the wetlands in question were,

according to their own expert, of only nominal value when acquired by them. Even with that approach, Petitioners have failed to validly cite a single case showing that any Federal Circuit Court of Appeals or state court of last resort would have decided the case at bar differently than did the Supreme Court of Virginia. While there will no doubt be many occasions for exploring the "relevant calculus" for "parcel as a whole" analysis, this case is surely not one of them.

For the reasons stated, Accomack County, Virginia, respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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